HUTCHINSON, C.J. & MIDDLETON, J. 1899

Dec. 23

[HUTCHINSON, C.J. AND MIDDLETON, J.]

HARALAMBO AND OTHERS, CHILDREN AND HEIRS OF CONSTANTINO, DECEASED, *Plaintiffs,*

v.

A. ASHMORE,
MEHMED SADIK EFFENDI,
AS TRUSTEES OF EVQAF, *Defendants.*

EVQAF—MAHLOUL—INHERITANCE—MULHAQA IJARETEIN VAQF—MUTEVELLI—SALE WITHOUT REGISTRATION—MUEJELLE—EQUITABLE RIGHTS—PURCHASE MONEY—THE LAND TRANSFER LAW, 1883, SEC. 4—THE LAND TRANSFER AMENDMENT LAW, 1890, SEC. 6—TREATISE ON THE LAWS OF EVQAF BY OMER HILMI, ART. 210, p. 54.

D., the executor of C.'s will in 1889, *in due form under the Land Transfer Law of* 1883, *sold a house forming part of a Mulhaqa Ijaretein Vaqf to E., and E. paid the purchase money before the declaration of sale was made.*

The Land Registry Office declined to complete the sale and register till the Muejellé owing on the property by the vendors was paid, but E. took possession of the house and enjoyed the proceeds of it till his death in 1898, *without heirs entitled to inherit the property.*

There was no evidence that the purchase money had been repaid by the heirs of C. to the heirs of E.

The Defendants claimed the house as Mahloul.

HELD: *that Plaintiffs, the heirs of C., remained the legal owners of the house, and that there was no equity as between the Plaintiffs and Defendants which would make it right for the Court to refuse to grant their legal rights to the Plaintiffs, except on the terms of their repaying the purchase money.*

APPEAL from the District Court of Nicosia.

Lascelles, Q.A., for the Appellants.

Artemis for the Respondents.

The facts and arguments sufficiently appear from the judgments.

1900

Jan. 5

HUTCHINSON, C.J. The Plaintiffs' claim is to restrain the Defendants from interfering with a shop in Nicosia belonging to the Plaintiffs by title-deed, and to set aside any registration of it as Vaqf.

In 1889, Demetrios Theodosiades, acting as guardian of the Plaintiffs, who were then infants, under their father's will, sold this property to Dr. Eukleides for £73. It was Vaqf and belonged to the Plaintiffs' father and was registered in his name. It appears that the parties intended at the time to have a proper legal transfer made: and there is in evidence a declaration of sale made on the 5th November, 1889, by Demetrios Theodosiades and deposited in the Land Registry Office. The office, however, refused to issue a title-deed to the purchaser until certain arrears of ijaré due on the property were paid; the purchaser refused to

pay the arrears; consequently no title-deed was issued, and after some time, probably, as appears from an endorsement on one of the documents put in evidence, in July, 1890, the Land Registry Office sent back the old kochan to the vendor.

There is in evidence a letter written on the 23rd of March, 1891, by Dr. Eukleides to the Director of Survey, in which he submits that the arrears of ijaré ought to be collected from the vendor and that the purchaser ought not to be asked to pay them, and requests that the title-deed should be issued to him. To this, the Director of Survey replied on the 24th of April, 1891, that " nearly a year and a half has elapsed " since this question was raised, and you should have objected at the time. " As the transfer was not carried out I returned the kochan to the owner, " and I regret I cannot now help you." So far as we know, no further step was taken by Eukleides to procure registration in his name; there is no evidence that the transfer fees were paid or tendered; and the arrears of ijaré were not paid; but the purchase money, £73, was paid to the vendor, who duly credited the plaintiffs with it in his accounts with them; and Eukleides took possession of the property and received the rents of it for 9 years, the property still remaining registered in the name of the Plaintiffs' father.

Eukleides then died, without leaving any heirs who could have inherited the property if it had been registered in Eukleides' name; and the Plaintiffs now claim the property as heirs of their father, in whose name it still stands; while the Defendants, who are the Delegates of Evqaf, claim it as Mahloul.

It was argued for the Defendants, first, that Eukleides had done everything that he was bound to do in order to procure himself to be duly registered; that the Land Registry Office had no right to require him to pay the arrears of ijaré, and that, therefore, he ought to be deemed to have been duly registered; but, secondly, that, even if the Land Registry Office had such a right, yet as between Eukleides and the Plaintiffs it was the Plaintiffs who ought to have paid the ijaré and that they cannot be allowed to take advantage of their own wrongful neglect to do so; and thirdly, that, according to the decisions of this Court, the Plaintiffs cannot claim to recover possession of the property without repaying the £73.

I am of opinion that we cannot hold that Eukleides had done all that he was bound to do in order to obtain registration. If is for the Defendants to prove either that there were no arrears of ijaré due, or that the Land Registry Office had no right to require them to be paid before issuing a kochan to the purchaser; and in the absence of any such proof, we must assume that the Land Registry Office acted rightly.

With regard to the second contention, we do not know the terms of the contract between Eukleides and the vendor; but the vendor gave evidence at this trial and said: " Dr. Eukleides would not take out the " kochan because he did not know it was Vaqf. He did not ask for the " money back: I would not have given it any way. He became aware " when the ijaré was asked for. I don't remember if he asked me to " pay the ijaré." That is the only evidence on that point. It seems strange that if Eukleides intended all along to have a proper transfer made, and if he thought that he had a right to require the vendor to pay the arrears of ijaré, he should have paid the purchase money and made no effort to compel the vendor to pay the arrears. Still it may be the fact that, as between him and the vendor, the vendor ought to have paid the ijaré. I cannot see, however, that that fact would give any rights to the Defendants, who are only claiming the property on the ground that Eukleides left no heir.

The third point touches a question which has often been discussed in judgments of this Court. In all the cases to which I am about to refer, there had been what is called a private or irregular sale of immoveable property without any registration in the name of the purchaser. In Christinou Stavrino, *v.* Queen's Advocate, C.L.R., I. 46, the Court said: " it has been many times decided by this Court that informal " sales of land cannot be regarded. To complete a sale of land the law " requires registration." In Assinetta H. Georgi, *v.* H. Georgi Bratso. C.L.R., I., 45, the Court said. " we have often decided that under con- " tracts of this nature, private contracts as they are called, unaccom- " panied with registration, the vendee only acquires the right to be " protected against the vendor until he repays the purchase money;" and they held that the purchaser, who had paid the purchase money and taken possession and had not been disturbed by the vendor, could not compel the vendor to cause the property to be registered in the purchaser's name or to refund the purchase money. In Theodoulo Zenobio, *v.* Meirem Osman, C.L.R., II., 168, the purchaser had paid the purchase money and taken possession, and afterwards the property was seized and sold in execution at the suit of a judgment creditor of the vendor; whereupon the heirs of the purchaser sued the heirs of the vendor,—both the vendor and the purchaser having died,—for return of the purchase money; and, the District Court having dismissed the action, the Supreme Court on appeal upheld the dismissal and said in the course of its judgment (p. 172): " we have more than once expressed the view " that the vendor, if he desires to obtain possession of the property, must " repay the purchaser the amount of the purchase money. In stating " this view we cannot find any case in which the Court has laid down

" the principle on which it rests. It appears to us to rest, not on any " implied contract between the parties, whereby the vendor guarantees " the purchaser the quiet enjoyment of the property he purports to sell, " but rather on principles of general equity which forbid the vendor to " take a wrongful advantage of his own share in a transaction which he " knows is without any legal effect." In Michail Gavrilidi *v.* Sava Georgi, C.L.R., III., 140, the purchasers were let into possession but never paid the purchase money, and the vendor afterwards re-took possession and sued the purchasers for damage for breach of the contract to buy the land. The Court in deciding against the Plaintiff said: " the furthest " extent that the judgments of the Supreme Court go, is that, in a trans- " action of the nature of the one under consideration, it would be in- " equitable to allow the vendor to recover the possession of the land and " at the same time retain the purchase moneys, and that therefore in a " suit by the vendor to turn the purchaser out, we have intimated that " such an order would only be made on the terms that the vendor re- " funded to the purchaser the amount of the purchase moneys." In Georghio Anastassi, *v.* H. Iosifi H. Kyriako, C.L.R., III., 243, the purchaser had been let into possession, but the purchase money had not been paid, and the vendor, being still the registered owner, sued the purchaser to recover possession. The Supreme Court said: " the Supreme " Court has in several cases laid down the principle, that a person who " has affected to dispose of property in a manner not recognized by the " law, should not on equitable grounds be allowed to recover the posses- " sion of his property and retain the purchase money too;" but went on to say that in the case then before it there was no evidence that the purchase money had been paid; and it therefore gave judgment for the Plaintiff.

After examining all these cases, I believe that the rule which they establish is correctly laid down in the case of Michail Gavrilidi, *v.* Sava, above quoted, where the Court said: " the only rights which will be re- " cognized are the right of the purchaser to have possession of the pro- " perty as against the vendor himself until the latter repays the purchase " money." And in my opinion the rule has no application to the present case, where the question is not between the vendor and the purchaser, but between the vendor and persons who claim the property as Mahloul. I am of opinion that there are no equities between these parties which would make it right for the Court to refuse to grant their legal rights to the Plaintiffs except on the terms of their paying money to some third person who is not before the Court, and about whom we know nothing, and in or with whom the Defendants have no interest or connection.

I think, therefore, that the Plaintiffs are entitled to the order for which they ask restraining the Defendants from interfering with the property

HUTCHINSON, C.J.

HARALAMBO AND OTHERS v. A. ASHMORE AND ANOTHER

mentioned in the writ. But as there is no evidence that the Plaintiffs are yet registered, the judgment of the District Court must be varied by making it subject to the production of a kochan by the Plaintiffs; with that exception the judgment of the District Court should be affirmed, and the Defendants must pay the costs of this appeal.

MIDDLETON, J. This action was brought to restrain the Defendants from interfering with a shop in Nicosia, and to obtain the cancellation of any registration, if such existed, of the shop as Vaqf.

The Plaintiffs were the heirs of the registered owner of the shop in question, and on 6th November, 1889, their guardian and the executor of their father's will, Demetrios Theodossiades, made a declaration of sale of the shop in proper form to one Dr. Yoanni Eukleides for £73, which sum Demetrios received and credited the heirs with.

Dr. Eukleides took possession of the shop and had it for 9 years, when he died.

No title-deed was ever issued to Dr. Eukleides, as the shop being Vaqf, certain Muejellé was outstanding at the time of the sale which he refused to pay, and the shop was never registered in his name but remained registered in the name of the Plaintiffs' father, to whom the Land Registry Office returned their title-deeds upon declining to register the sale.

Dr. Eukleides left no heirs who, according to law, were entitled to inherit the shop.

The Defendants, thereupon, claimed the shop as Mahloul, and this action was brought by the Plaintiffs who claimed it as registered owners.

The District Court, after hearing certain evidence, gave judgment for the Plaintiffs on the ground that the Plaintiffs were the registered owners, and that as between Plaintiffs and Defendants, the latter had no claim to equitable relief.

The Defendants appealed, and the Queen's Advocate on their behalf contended (1), that inasmuch as Defendants stood practically in the position of Eukleides the principle laid down by the Supreme Court in former decided cases would apply, and the Plaintiffs would not be entitled to possession of the house without previously returning the purchase money; (2), that Plaintiffs were bound by their declaration of sale, that Eukleides did all in his power to make the sale a perfect one, that the Land Registry Office were wrong in not completing it by registration, and that practically, there was a complete sale and registration to which the Court should give effect, but if this was not clear, the case

should be sent back for further evidence as to why the title-deed was not issued.

For the Plaintiffs it was argued they were the legal registered owners, that the property could certainly be sold by their judgment creditors, that even if Plaintiffs had received and retained the money as well as the shop, which Counsel did not admit, there was no equity as between the Defendants and Plaintiffs, and that all the decisions of this Court pointed to the conclusion that, under the circumstances, Eukleides never was the legal owner, inasmuch as there was never any change in the registration effected in his favour.

We have obtained from the Registrar General the documents which were put in evidence and produced by the Land Registry Clerk before the District Court, and from the title-deed which was prepared for the purpose of issue to Eukleides, I gather that the house in question is part of a Mulhaqa Vaqf of the Tekké of Aziz Effendi, and that it is Ijaretein as the Muejellé written in the kochan as Bedel Ushr is 15 c.p. per annum.

I gather also that the declaration of sale was duly made on 6th November, 1889, and that it would have been carried out by the Land Registry Office if the Muejellé outstanding on it had been paid by the purchaser.

As this was not paid, and a year and a half appears to have elapsed from the time the question was raised without objection from Dr. Eukleides, the Director of Survey appears to have returned their kochans to the Plaintiffs without carrying out the transfer.

By s. 4 of Law IV. 1883, which was in force when the declaration certified by the Village Judge was received by the Land Registry Office, a kochan might be issued without the concurrence of the Cadi, but in all other respects the registration and issue of the kochan was to be effected according to the regulations heretofore in force.

Amongst the regulations in force and observed under this Law, was one which under s. 6 of Law XIX. of 1890 (and this Law repealed the Law of 1883), was made substantive law to the effect that the Land Registry Official might decline to issue kochans, unless they were applied for and the prescribed fees paid within 20 days of the date of the signing of the declaration of sale, and require the formalities of a declaration to be again had and complied with.

It may well be, therefore, that the Director of Survey was acting within his authority when he refused to sanction the transfer, but in any case no legal transfer was made, nor do I think that any evidence has been given to shew us that Dr. Eukleides was equitably entitled to

be deemed the legal transferee and to enable us to act as though the transfer had, in fact, taken place in the books of the Land Registry Office.

It is possible that if it had been proved that Dr. Eukleides had tendered the fees for transfer within the prescribed period, and further that the Land Registry Office had no legal right to demand the outstanding Muejellé from him before carrying out the transfer, that my opinion would have been different.

There is another point which was not raised by the Plaintiffs, and which, I think, would have a very material bearing on this case, and that is, that the assent of the Mutevelli of the Vaqf had not been obtained to the sale on the Plaintiffs' behalf to Dr. Eukleides. According to Omer Hilmi in his treatise translated by Mr. Tyser and Mr. Demetriades, p. 54, Art. 210, no alienation of Ijaretein property, even if made before a Judge is valid without the consent of the Mutevelli.

There is a further point also, as to whether the Evqaf Delegates or the Mutevelli would be entitled to claim this property as Mahloul. Into these two last points I do not, however, deem it necessary to enquire, but would simply base my decision on the grounds that there has neither been a legal transfer to Dr. Eukleides, nor has he been shewn to be equitably deemed the transferee, and that whether or not the result of this decision may be that the Plaintiffs obtain the house and retain the purchase money, yet as regards the latter, there is no equity between the Defendants and the Plaintiffs, as the Defendants do not stand in the same position as Dr. Eukleides or his heirs.

As regards the Queen's Advocate's suggestion that the case should be sent back for further evidence, it appears to me that the Defendants, who called the Land Registry Office Clerk to give evidence and produce papers on their behalf, had ample opportunity of eliciting all that they deemed necessary at the time, and that there is, therefore, no ground for acceding to this request.

In my opinion, therefore, this appeal must be dismissed with costs.

Appeal dismissed. Judgment of the District Court affirmed, subject to the production by the Plaintiffs of a kochan in their name for the house.